United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 29, 2003

TO : Robert B. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Golden Gate Painting
Case 20-CA-31153-1 512-5009

This Bill Johnson's[1]/BE & K[2] Section 8(a)(1) case was submitted on whether the Employer unlawfully filed a federal court lawsuit seeking to enjoin the Union from monitoring and attempting to interfere with the Employer's business as a tortious interference with business relationships.

We conclude that the Region should dismiss this charge, absent withdrawal, because the lawsuit's alleged tortious conduct is not baseless under state law; under all the circumstances, we would not argue baselessness here solely because the suit may lack federal jurisdiction; the lawsuit is not preempted; and the lawsuit otherwise was not filed with a cost-imposing retaliatory motive.

FACTS

James B. Haugabook is the sole proprietor of the Employer, which had been a signatory to a collective-bargaining agreement with Painter's Union District Council 8 ("Union"). In a 1988 bankruptcy proceeding, the court released the Employer from that collective-bargaining agreement and Haugabook thereafter operated nonunion. In September 2002, a general contractor awarded the Employer a painting subcontract to begin in May 2003. Haugabook asserts that in November or December 2002, the general contractor told Haugabook that Union organizer Carson had asked the general contractor to use another painting subcontractor, citing the Union's prior relationship with the Employer.[3]

Union organizer Carson states that in 2001 and 2002, when he found the Employer on jobsites, he discovered that

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[1] Bill Johnson's Restaurant v. NLRB, 461 U.S. 731 (1983).

[2] BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

[3] The Employer filed a Section 8(b)(4)(i)(ii)(B) charge regarding this conduct on May 7, 2003. The Region's May 29 dismissal of the charge was upheld on appeal on July 29.

Haugabook was not maintaining worker's compensation insurance, was not using certified apprentices, and may not have been paying area standard wages and fringes. Carson admitted speaking to the general contractor about Haugabook's past failures to pay prevailing wages and worker's compensation, but denied asking the general contractor to remove the Employer.

Haugabook assertly telephoned Carson who tried to talk Haugabook into backing out of the subcontract because of the past trouble the Union had with him, because he used nonunion employees, and because the wages he paid were "somewhat problematic." Haugabook told Carson that he would think about it, but he eventually decided to perform the work.

In March 2003, Haugabook, acting pro se, filed in federal district court a series of documents against Painters Local Union No. 4, District Council of Painters No. 16 (Union).[4] One document, entitled "Temporary Restraining Order and Complaint," seeks relief "for Interfering in a Contractual Relations and for Tortuous [sic] Interference with an Economic Relationship." Haugabook mailed copies of the document and the supporting documents to the Union.

The document complains that the Union has monitored Haugabook's performances with the City of San Francisco and its instrumentalities and with the University of California. The document alleges as causes of action that the Union has no legal obligation and no legal jurisdiction to contact or interfere with general contractors or public and private agencies; that the City of San Francisco and its instrumentalities had neither obligation nor jurisdiction to communicate with the Union about Haugabook; that Haugabook enjoys a constitutional right to work anywhere in the state of California without interference; and that the Union interfered with that right. The document is supported by two declarations which state that the Union spoke to a general contractor and to the City of Brisbane, and asked them not to do business with Haugabook.

On March 24, the District Court filed an order denying what it called an application for a TRO, on the ground that money damages would adequately compensate Haugabook. The court also ruled that the document Haugabook had filed was not a complaint, and that Haugabook must file a complaint. Finally, the court noted that the only perceived basis of federal question jurisdiction was the parties' collective-

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[4] District Council 16 had apparently succeeded to District Council 8.

bargaining agreement. While thus arguably raising a question whether there was any federal question jurisdiction in the case, the court did not decide the issue.

By letter dated March 26, Union counsel informed Haugabook that his documents seek relief which would be prohibited by the Norris-LaGuardia Act, and also violate the NLRA because they seek to enjoin lawful protected activity. Union counsel also asserted that Haugabook's mailing the documents to the Union was not effective service. On April 3, Haugabook filed an amended "complaint" which did little more than add the word "complaint" to the previous document. On April 10, he caused the complaint, the memorandum of points and authorities, a proposed order enjoining the conduct of which he complained, and the two declarations, all to be served on the Union. By letter dated April 22, Union counsel asserted to Haugabook that he had not effectively served the Union with his documents, and that the material also contained no summons. As of September 7, the Union had not filed an answer to the allegations of the documents and, except for the scheduling of a conference order, there have been no further proceedings in the case.

ACTION

We conclude that the Region should dismiss this charge, absent withdrawal, because the case is not baseless and was not filed with a "cost imposing" retaliatory motive.

In BE & K, the Supreme Court rejected the Bill Johnson's standard for adjudicating ultimately unsuccessful but reasonably based lawsuits.[5] The Court reasoned that the Board's standard was overly broad because the class of lawsuits condemned included a substantial portion of suits that involved genuine petitioning.[6] The Court thus indicated that the Board could no longer rely exclusively on the fact that the lawsuit was ultimately meritless but must determine whether the lawsuit, regardless of the outcome, was reasonably based.[7]

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[5] BE & K, 536 U.S. at 527-528, 532 ff.

[6] Same, at 533-534.

[7] Same, at 535-537. The Court left open the possibility that an unsuccessful but reasonably based lawsuit that would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome," may be an unfair labor practice. Same at 536-537.

Because the Supreme Court in BE & K did not articulate the standard for determining whether a completed lawsuit is baseless, the Bill Johnson's standard for evaluating ongoing lawsuits remains authoritative. The Bill Johnson's Court, in discussing the above standard for ongoing lawsuits, stated that while the Board's inquiry need not be limited to the bare pleadings, the Board could not make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.[8] Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."[9] Thus, even after BE & K, a lawsuit is baseless if it presents unsupportable facts or unsupportable inferences from facts and if it presents "plainly foreclosed" or "frivolous" legal issues.

The BE & K Court also considered the Board's standard of finding retaliatory motive in cases in which "the employer could show the suit was not objectively baseless."[10] The Court viewed the Board as having adopted a standard in reasonably based suits of finding retaliatory motive if the lawsuit itself related to protected conduct that the petitioner believed was unprotected. The Court criticized this standard for finding retaliatory motive in non-meritorious, but reasonably based, cases.[11] Similarly, the Court reasoned that inferring a retaliatory motive from evidence of antiunion animus would condemn genuine petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal[.]"[12]

Significantly, while the Supreme Court in BE & K rejected the Board's standard of finding a lawsuit retaliatory solely because it is brought with a motive to "interfere with the exercise of protected [NLRA Sec. 7] rights,"[13] the Court limited its holding to reasonably-based lawsuits. Indeed, the Court, at the outset of its

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[8] 461 U.S. at 744-46.

[9] Same, at 746-47.

[10] BE & K, above, at 533.

[11] Same, at 533-534.

[12] Same, at 534 (emphasis in original).

[13] Same, at 533.

retaliatory motive discussion, pointedly noted that the issue presented was whether the Board

> may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless (emphasis added).

Then, in discussing retaliatory motive, the Court referred only to reasonably-based suits:

> If [a plaintiff's] belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning."[14]

Thus, even after BE & K, the analysis of retaliatory motive as to baseless lawsuits continues to be that set forth in Bill Johnson's, and the cases applying Bill Johnson's.

1. The Employer's suit is not baseless in law or fact.

California law recognizes such torts as intentional interference with contract, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage.[15] Haugabook's lawsuit appears to be sufficiently well pled, under California law, to present at least a reasonable basis upon which he could recover. Haugabook's suit also asserts a factual basis for its allegations. Although Carson denies having asked the general contractor to remove the Employer, Haugabook states that the general contactor asserts otherwise. The dispute of facts arguably could be the basis for a claims that Carson's conduct was unprotected.[16] The lawsuit thus does not appear to be baseless in state law or fact; the only other consideration is whether the lawsuit has no reasonable basis because it may lack federal jurisdiction.

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[14] Same, at 533-534.

[15] See, e.g., Della Penna v. Toyota, 11 Cal.4th 376, 902 P.2d 740, 45 Cal.Rptr.2d 436 (Cal. 1995).

[16] See Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960, 962-3 (2000) (although the Board's inquiry into baselessness need not be limited to a lawsuit's bare pleadings, the Board must refrain from making credibility determinations or drawing inferences from disputed material facts, which would usurp the fact finding role of the courts).

The district court did not dismiss the suit for want of federal jurisdiction. To the contrary, the court allowed Haugabook to proceed. We would not argue baselessness here solely because the Employer, who is filing pro se, may have alleged a reasonably based tort in the wrong forum.

2. The lawsuit is not baseless as preempted under Brown v. Hotel Employees, 468 U.S. 491, 502 (1984).

In Brown, the court held that if conduct is actually protected by a federal statute such as the NLRA, state law that purports to regulate it is preempted not as a matter of the primary jurisdiction of the Board but as a matter of substantive right. The Board has found lawsuits to be unlawful as preempted under Brown where the lawsuits clearly attacked conduct which was actually protected by the Act.[17]

The lawsuit here attacks the Union's monitoring of Haugabook's work. Such monitoring may have been protected, or it may have been conducted in such a manner that any Section 7 protection was lost by the tortious conduct alleged by Haugabook, in retaliation against Haugabook's setting aside its former Union bargaining agreement and becoming a nonunion contractor. Resolution of whether the Union's conduct was protected under Section 7 turns on factual and credibility disputes. Since the lawsuit thus does not clearly encompass actually protected activity, it is not preempted under Brown.

3. The lawsuit is not baseless as preempted under Garmon.

In San Diego Building Trades Council v. Garmon,[18] the Supreme Court held that when "it is clear or may fairly be assumed that the activities which the state purports to regulate are protected by Section 7 ... or [prohibited] by Section 8," or even "arguably subject" to those sections, the state and federal courts are ousted of jurisdiction, and "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." In Sears, Roebuck & Co. v. Carpenters,[19] the Supreme Court further clarified

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[17] See Manno Electric, Inc., 321 NLRB 278 (1966), enfd. mem. 127 F.3d 34 (5th Cir. 1997); Associated Builders & Contractors, Inc., 331 NLRB 132 (2000).

[18] 359 U.S. 236, 244-245 (1959).

[19] 436 U.S. 180 (1978).

the situation in which states could regulate conduct which was only arguably protected by the Act. In Sears, the Supreme Court held that a state was free to regulate arguably protected conduct "when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so," provided the exercise of state jurisdiction would not "create a significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct." 436 U.S. at 202, 203.

In Loehmann's Plaza, 305 NLRB 663 (1991), the Board held that when the conduct the state is attempting to regulate merely constitutes "arguably" protected activity, preemption occurs only upon Board involvement in the matter. The determination to become involved in a matter is made by the General Counsel who, before issuing a complaint, must conclude that "sufficient evidence has been presented to demonstrate a prima facie case." 305 NLRB at 670. If, in an arguably protected matter, the Board becomes involved by the General Counsel's issuance of a complaint, the state proceeding involving the same matter is preempted pending resolution of the Board proceeding and the plaintiff in the state suit must take affirmative action to stay the court proceeding within 7 days of the issuance of the complaint. Loehmann's Plaza, 305 NLRB at 671; Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162, 1178 (D.C. Cir. 1993) (agreement with the Loehmann's standard that Garmon preemption occurs upon issuance of ULP complaint).

We assume, for the sake of argument, that the Employer's lawsuit attacks arguably protected activity. We nevertheless conclude that the lawsuit is not preempted under Garmon because, under Sears/Loehmann's, Garmon preemption occurs only upon Board involvement. The Board is not involved in this case essentially because the Employer merely filed a lawsuit against the Union. The Employer has unsuccessfully attempted to place the conduct at issue in the lawsuit before the Board in the dismissed 8(b)(4) charge. Neither Haugabook nor the Union committed any other act related to the lawsuit allegations against which the other could have filed an unfair labor practice charge on which the General Counsel could issue complaint, all of which is necessary to find Garmon preemption. Absent such Board involvement, Haugabook's lawsuit is not preempted under Garmon.

Finally, we conclude that this non-baseless lawsuit is not unlawfully retaliatory because there is insufficient

evidence that it was filed solely to impose the costs of litigation. In BE & K, Justice O'Connor stated that an unsuccessful but reasonably based lawsuit might be considered an unfair labor practice if a litigant would not have filed it "but for a motive to impose the costs of the litigation process, regardless of the outcome."[20] We have applied the "impose-costs" standard in cases in which a lawsuit could not be said to be baseless.[21] Here, there is no evidence that the Employer filed the suit without any regard for its outcome. The Employer instead filed this suit in a clear attempt to stop what the Employer deemed unlawful conduct that was tortiously interfering with its business.

In sum, as this lawsuit is neither baseless nor retaliatory, the Region should dismiss the charge, absent withdrawal.

B.J.K.

[20] BE & K, above, at 536-537. See also same at 539 (Breyer, J., concurring).

[21] See, e.g., Aegis Fire Systems, Case 32-CA-19574-1, Advice Memorandum dated November 27, 2002, at 2-3; Dilling Mechanical Contractors, Case 25-CA-25094, Advice Memorandum dated December 11, 2002, at 7 and n. 25; and Stonegate Construction, Inc., Case 20-CA-30724-2, Advice Memorandum dated January 23, 2003, at 12.